Charles H. McCauley Associates, Inc. *and* **Richard L. Beck.** Case 10-CA-14423

April 25, 1983

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On March 12, 1980, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] There the Board affirmed the Administrative Law Judge's findings that Respondent had violated Section 8(a)(1) of the Act by forbidding its employees to engage in protected concerted activities and/or union activities and by threatening its employees with discharge if they engaged in such activities, and that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Richard L. Beck because he had engaged in union and other protected concerted activities. In adopting the Administrative Law Judge's Decision, the Board found no merit to Respondent's exception that the Administrative Law Judge erred in excluding evidence of its alleged unconditional offer of reinstatement to Beck. The Board noted that the issue of an unconditional offer of reinstatement could be resolved during the compliance stage of the proceeding.

Subsequently, the Board filed a petition for enforcement of its Order with the United States Court of Appeals for the Fifth Circuit. On September 28, 1981, the court issued its opinion,[2] in which it affirmed the Board's determinations. However, the court further held that the Board should determine whether Beck had been offered unconditional reinstatement before proceeding with the remedy and it remanded that aspect of the case to the Board.

The Board has long held that the "better practice" is for an administrative law judge hearing alleged unfair labor practices to admit testimony concerning offers of reinstatement.[3] Although the Administrative Law Judge excluded such evidence in the instant case, the Board found that the deferral of that issue to compliance resulted in no prejudice to Respondent and that the conservation of the Agency's limited resources would be best achieved by deferring the issue of Respondent's offer of reinstatement to the compliance stage of this proceeding. In view of the court's decision, however, the Board has accepted the remand as the law of the case.

Thereafter, the Board notified the parties that it had decided to accept the court's remand, and remanded the proceeding to the Regional Director for Region 10 for the purpose of issuing a notice of hearing before an administrative law judge in accordance with the remand of the Fifth Circuit.[4] Subsequently a hearing was held, and on October 28, 1982, Administrative Law Judge Michael O. Miller issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in reply thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and the briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge. Accordingly, in our Supplemental Decision and Order, consistent with the Administrative Law Judge's Supplemental Decision, we have modified our original Order and notice to reflect the finding that Charging Party Beck had rejected Respondent's unconditional offer of reinstatement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Charles H. McCauley Associates, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Forbidding its employees to engage in union or other protected concerted activities and threatening them with discharge if they so engage.

(b) Discriminatorily discharging employees because they engage in union or other protected concerted activities.

[1] 248 NLRB 346.

[2] 657 F.2d 685.

[3] *Kelly Brothers Nurseries, Inc.*, 145 NLRB 285 (1963), modified on other grounds 341 F.2d 433 (2d Cir. 1965).

[4] Initially, in the unusual circumstances of this case and in view of the General Counsel's and the Charging Party's failure to file statements of position or to move otherwise to contest Respondent's proffered evidence (a letter from Respondent to Beck offering him unconditional reinstatement and a letter from Beck rejecting that offer) filed in its statement of position, the Board found that such evidence provided a sufficient record to determine the issue of reinstatement. Accordingly, the Board issued a Supplemental Decision and Order, 261 NLRB No. 122 (1982), finding that Charging Party Beck had rejected Respondent's unconditional offer of reinstatement. Thereafter, in response to motions for reconsiderations from the General Counsel and the Charging Party contesting our reliance on Respondent's proffered evidence and in the unusual circumstances of this case on court remand, the Board issued an order rescinding the initial Supplemental Decision and Order and remanded the proceeding to the Regional Director on June 16, 1982.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Richard L. Beck whole, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," for any loss of earnings that he may have suffered by reason of the discrimination against him, from the date of his unlawful discharge to March 27, 1979, the date on which he refused an unconditional offer of reinstatement.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT forbid our employees to engage in union activities or to talk among themselves concerning wages, hours, and working conditions.

WE WILL NOT threaten to discharge employees who engage in union activity or in conversation about wages, hours, and working conditions.

WE WILL NOT discharge any of our employees because they engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL make Richard L. Beck whole, with interest, for any loss of earnings he may have suffered by reason of the discrimination against him from the date of his unlawful discharge to March 27, 1979, the date on which he refused an unconditional offer of reinstatement.

CHARLES H. MCCAULEY ASSOCIATES, INC.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This supplemental proceeding was heard in Birmingham, Alabama, on September 20, 1982, pursuant to a remand ordered by the Circuit Court of Appeals for the Fifth Circuit[1] and an order of the Board further remanding this proceeding to the Regional Director for Region 10. The sole issue to be determined, pursuant to the court's remand, is whether Charles H. McCauley Associates, Inc., herein called Respondent, had offered Richard L. Beck unconditional reinstatement on or about March 26, 1979, thus negating the necessity for a reinstatement remedy and tolling its backpay liability.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. No briefs were

[1] *NLRB v. Charles H. McCauley Associates*, 657 F.2d 685 (1981), enfg. in part and remanding in part 248 NLRB 346 (1980).

filed; the oral arguments of the General Counsel and the Respondent have been carefully considered.

Upon the entire record, including my careful observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE FACTS

Richard Beck was discharged by Respondent on February 26, 1979.[2] On February 28, he filed the unfair labor practice charge involved herein, alleging that Respondent's statements to, and discharge of, him violated Section 8(a)(1) and (3) of the Act.[3]

On March 12, Respondent's counsel, D.H. Markstein, Jr., invited Beck to contact his office if he wished to discuss settlement.[4] Beck responded orally and by letter dated March 16. In that letter, Beck set forth three essential elements for settlement: reinstatement with full seniority; full backpay; and

> Written notice to me and my fellow workers, signed by the employer, that we will not be discharged, threatened with discharge, restrained, coerced or in other manner interfered with for exercising our constitutional right to engage in organizing activities for the purpose of collective-bargaining with our employer.

When Beck met with Markstein on March 20, Markstein offered him a cash settlement of $1,000 provided that Beck would withdraw the charge and not seek reinstatement. Beck was further told that Respondent would not agree to post any notice to the other employees. On March 22, Beck rejected Respondent's offer, reiterating that settlement must include reinstatement, full backpay, "and some assurance that I will not be discriminated against for exercising my constitutional right to engage in organizing activities."

On Friday, March 23, Beck and Markstein met at the Board's Resident Office in Birmingham with two Board agents, C. Douglas Marshall, the resident officer, and field attorney Glenn M. Price. According to Beck, Markstein offered him reinstatement and full backpay with the understanding that Beck would withdraw his charge. When he asked Markstein whether Respondent would "honor my request about giving me some type of written assurance that I would not be discriminated against that I could show to the employees or something to hang on the bulletin board so they wouldn't be scared," Markstein told him, "no, you definitely cannot have that notice."

Markstein does not describe any such conversation in his testimony. It was his recollection that the Board agents separated Beck and him and "shuttled between them, attempting to negotiate a settlement." At some point, Markstein was told that there was no room for negotiation, that Respondent would have to offer "unconditional surrender," returning Beck to his job without conditions of any sort. Markstein agreed and asked the Board agent to draft the Company's offer so that it would be completely unconditional. Markstein recalled no discussions regarding the posting of a notice in the work place and testified that he told Price and Marshall that he would do whatever they wanted him to do. The testimony of Beck and Markstein, while different, is not inconsistent and no credibility resolution is required. Neither of the Board agents present at that meeting testified in this proceeding.

Price left the room, according to Beck's recollection, and returned with several copies of the following offer of reinstatement addressed to Beck:

> The company wishes to offer you immediate, full and unconditional reinstatement to your former position without prejudice to your seniority or other rights, privileges, or working conditions. There will be no reprisals for filing a charge with the National Labor Relations Board or for engaging in protected concerted activity under the Act. The company will also make you whole for any loss of pay while you were discharged.

Beck took a copy of the offer. Markstein testified that Beck was also told, at that time, that if he accepted the offer he would be required to work the same hours as everyone else but that there would be no recriminations, no hard feelings, and no conditions imposed on his reinstatement, that he would be on a par with everyone else. Markstein had no firm recollection as to whether or not Beck accepted the offer at that time; it was his impression that Beck had accepted it.[5]

On March 25, Beck wrote Markstein, rejecting the offer in the following terms:

> As I indicated to you during this meeting, your offer was not agreeable to me at that time. As of this date your verbal offer remains completely unacceptable. I cannot consider any type of verbal and/or unconditional settlement agreement, regardless of the contents, prior to reinstatement.
>
> I am willing to review a settlement agreement provided it is submitted to me complete, in writing, distinctly, *and in good faith only.*

[2] All dates hereinafter are 1979 unless otherwise specified.

[3] The Board, affirming the rulings, findings, and conclusions of this Administrative Law Judge, and adopting his recommended Order, ultimately concluded that Respondent violated Sec. 8(a)(1) by forbidding its employees to engage in protected concerted activities and/or union activities and by threatening them with discharge if they did so engage, and violated Sec. 8(a)(3) and (1) of the Act by discharging Beck because he had engaged in union and other protected concerted activities.

[4] Respondent objected to the introduction of any evidence concerning the settlement discussions which preceded the conference of March 23, discussed *infra*. That objection was overruled at the hearing and that ruling is adhered to herein. A full understanding of what took place on and after March 23 requires some consideration be given to the pre-March 23 discussions.

[5] While the original record herein indicates that Respondent had tolerated Beck's chronic tardiness and absenteeism and had allowed him to make up lost worktime for many months prior to his discharge, the General Counsel does not argue herein that Markstein was imposing an impermissible condition upon Beck when he told Beck that Beck would be expected to work the same hours as everyone else upon his reinstatement. The record does not suggest that the imposition of any such condition caused Beck's rejection of Respondent's offers.

> Please be advised that I will not be influenced to agree on any type of settlement agreement under force or pressure from anyone.

Beck served copies of this letter on both the company and field attorney Price.

On March 26, Respondent hand delivered another offer to Beck. It stated the following:

> The Company offers you immediate, full and unconditional reinstatement to your former position without prejudice to your seniority or other rights, privileges, or working conditions. There will be no reprisals for filing a charge with the National Labor Relations Board or for engaging in protected concerted activity under the Act. You will be afforded the same treatment as all other employees and you will be allowed to take vacation this summer, as is the normal practice. The company will also make you whole for any loss of pay while you were discharged.

This letter, like the earlier offer, was drafted by Price for Markstein with the expressed hope that it would "resolve all problems with respect to the discharge of Richad L. Beck."

It did not. On March 27, Beck responded to the offer stating, *inter alia*, as follows:

> This will acknowledge receipt of your hand delivery letter dated March 26, 1979, in which you offer to reinstate my employment immediately. You also state that it would an unconditional reinstatement.
>
> I must reiterate, that my position on any type of settlement agreement must be as set forth in previous correspondence and I will not consider an unconditional reinstatement settlement.
>
> *This is to inform you that your offer is unacceptable.*
>
> Several additional reasons why I will not accept this proposal are as follows:
>
> 1) I do not feel that this offer is in good faith.
>
> 2) Your associates gave four false reasons to the Unemployment Compensation Claims Center as reasons why my employment was terminated.
>
> 3) Your representative offered my attorneys at the National Labor Relations Board a proposed settlement agreement containing everything which was set forth in my letter dated March 16, 1979. During this meeting on March 23, 1979, the most important of my requests was denied.
>
> 4) After your representative acknowledged receipt of my letter dated March 16, 1979, in which I agreed to enter into a settlement agreement providing it contained specific conditions, he offered money to me providing I sign a release of the charge that I filed with the National Labor Relations Board. This was inconvenient to me; the meeting served no purpose; and also it was very conditional.
>
> Therefore, I have no reason to believe that your offer is in good faith, leaving no other alternative except to reject your offer at this time.
>
> I see no further need in discussing a settlement type agreement with you, your associates, or your representative.[6]

He went on to state that he had decided that a "Board hearing is necessary concerning this entire matter in lieu of a settlement type agreement."

Sometime after March 27, field attorney Price called Beck and suggested that Beck had possibly waived his rights to reinstatement. Beck then retained his own counsel, Davis. Davis, after discussing the matter with Beck, wrote Markstein a letter dated April 2. Therein Davis stated that he had concluded that Beck's "reply to the reinstatement letter of March 26 was written under the misconception that he could be reinstated by the company only if he first withdrew the pending NLRB charge. At that time, Mr. Beck felt that it was imperative that he keep the charge active in order to protect his rights." On Beck's behalf, Davis sought to accept the March 26 offer of reinstatement and in turn offered to withdraw the NLRB charge. On April 4, Beck also wrote Respondent. In his letter, which acknowledged that the March 26 letter had offered "immediate, full and unconditional reinstatement," Beck offered to reconsider his March 27 position. He stated, "Upon being ill-advised as to the meaning of said *'unconditional reinstatement'* [the March 27 letter] was drafted in anger and did not reflect my true and sincere desires." Beck sought to return and offered to withdraw his charges.

On April 6, Markstein responded to the letter from Beck's counsel, as follows:

> Charles H. McCauley Associates, Inc. feels that Mr. Beck's letter of March 27, which unconditionally rejected McCauley's offer of reinstatement, terminated the matter and leaves nothing further to discuss. Furthermore, Mr. Beck's actions since March 26 have demonstrated such animosity toward the company and irresponsibility that he is no longer acceptable for reinstatement as an employee.

There was no further communication and Beck's unfair labor practice charge proceeded to complaint with the results as set forth above.

II. DISCUSSION AND CONCLUSIONS

The General Counsel contends that Respondent's offers were, at all times, conditioned on Beck's withdrawal of his charge, an act which would have precluded litigating for a finding of violation and the post-

[6] Beck contended that after he had received Respondent's March 26 offer, and unsuccessfully attempting to secure advice from either the Board agents or a union representative, he called both David Hand, Respondent's vice-president, and Markstein to ask them whether he would be required to withdraw his charge in order to return to work. He alleges that both told him he would have to do so. Both Hand and Markstein denied having any such conversations with Beck and, noting that Beck made no reference to these alleged conversations in his March 27 rejection of the written offer, as well as the demeanor of the witnesses, I credit Hand and Markstein.

ing of a Board notice informing Respondent's employees of their rights under the Act and of their freedom from reprisals for engaging in union and other protected concerted activities. Such a notice, the General Counsel contends, was of significance to Beck and Respondent's refusal to agree to the posting of a notice or to offer reinstatement while continuing to litigate the propriety of such a remedy rendered its offer conditional.[7] In so contending, the General Counsel points, in addition to the conversations and letters described above, to statements by Respondent's counsel indicating that its intention, in discussing reinstatement and backpay, was to resolve this matter short of litigation.

Respondent contends that by the plain meaning of its correspondence with Beck, it made an unconditional offer of reinstatement on March 26. I am compelled to agree with Respondent. In so concluding, I note, in addition to the clear and unambiguous language of Respondent's offers, that those offers met, in all particulars, Beck's demands. Thus, in his March 16 letter, Beck sought written notice to his fellow employees and himself stating that they were free to engage in the activities protected by the Act without interference. He reiterated a similar request in the letter of March 22, seeking "some assurance that I would not be discriminated against for exercising my constitutional right to engage in organizing activities." At no time did he insist upon the posting of a NLRB notice. Respondent's offers of reinstatement gave him the written assurances, and everything else, that he sought.[8]

The General Counsel cites *Tri-State Truck Service,* 241 NLRB 225 (1977), enforcement denied on other grounds 616 F.2d 65 (3d Cir. 1980), for the proposition that an offer of reinstatement conditioned upon the employee's disavowal of further interest in pursuing an unfair labor practice charge is not an unconditional offer. Unlike the offer in the cited case, which was impliedly conditioned on the employee disavowing interest in pursuing a charge filed by a fellow employee, Respondent's offers here, I find, were unconditional. Markstein may well have expected that acceptance of his offers would result in withdrawal of the charge but, in fact, he had offered to do whatever was necessary to satisfy both Beck and the policies of the Act in order to resolve this matter. Beck unequivocally rejected Respondent's offers. It would, I believe, be manifestly unfair to permit a charging party to extend Respondent's backpay liability virtually indefinitely by rejecting reinstatement offers which meet every requirement put forth by that charging party and which fully effectuate the policies of the Act.[9]

Accordingly, I find and conclude that Respondent offered Richard L. Beck full and unconditional reinstatement by its letter of March 26, and thereby negated the necessity for a reinstatement order and tolled its backpay liability.

[7] There is no evidence in this record to indicate that Respondent was offered and refused to agree to enter into an informal settlement agreement with the Regional Director and Beck. I must assume that no such offer was made. This record does not reveal why, if the posting of a Board notice was of such significance to Beck, the Board agents did not propose that Respondent settle the unfair labor practice charge in that fashion. The traditional informal Board settlement agreement would have included, in addition to other affirmative remedial actions, the posting of a notice. This question is especially pertinent where, as here, Respondent's counsel was not experienced in practice before the Board and had indicated his client's willingness to agree to anything necessary to resolve the matter without litigation. The absence of such evidence, together with the language of Beck's letters, suggests, and I conclude, that Beck was seeking assurances, but not necessarily the posting of a Board notice.

[8] To the extent that Beck's testimony regarding the meeting of March 23 indicates that Markstein rejected his request for "some type of written assurance that I would not be discriminated against that I could show to the employees or something to hang on the bulletin board so they wouldn't be scared," I must conclude that Markstein's alleged rejection of that request at that time appears to have been a bargaining position taken in the course of the settlement negotiations. His subsequent conduct, agreeing to "unconditional surrender" and extending the offers as drafted by the Board agents to meet *all* of Beck's conditions, constitutes an upgrading of Respondent's offers in order to satisfy Beck's demands.

[9] The General Counsel did not contend, other than in closing argument, that Respondent was obligated to renew its offer of reinstatement when Beck attempted to revoke his rejection of the earlier offer. Respondent was therefore never afforded an opportunity to respond to such a contention with evidence that it had been prejudiced by Beck's change of position or legal argument and I must conclude that this issue has not been fully litigated.